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IN THE

# Supreme Court of the United States

OCTOBER TERM—1973

**No. 731256**

CONNELL CONSTRUCTION COMPANY, INC.,
*Petitioner,*

*v.*

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc.,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, BUILDING CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE*

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| INTRODUCTION | 1 |
| INTEREST OF AMICI | 2 |
| SUMMARY OF REASONS FOR GRANTING THE WRIT | 3 |
| REASONS FOR GRANTING THE WRIT: | |
| I—The Issues and Effects of the Decision of the Court of Appeals | 4 |
| II—The Anti-Trust Considerations | 7 |
| III—The Labor Law Aspects | 15 |
| IV—The Circuit Court's Holding Runs Contrary to the Fabric of the National Labor Relations Act | 21 |
| V—The Court of Appeals has jurisdiction to Decide Whether the Union's Conduct is Lawful Under Section 8(e) as a Vital Factor in its Determination Whether the Clause Represents "a Legitimate Union Interest" Under the Anti-Trust Laws as Construed by This Court | 25 |
| CONCLUSION | 28 |
| APPENDIX | 29 |


### Cases Cited


| | |
|---|---|
| Allen Bradley Co. v. Local 3 IBEW, 325 U. S. 797 (1945) | 7, 9 |
| Bangor Bldg. Trades Council, 123 NLRB 484, enf. 278 F. 2d 287 (1st Cir. 1960) | 16, 17 |

PAGE

Bricklayers, Masons and Plasterers, Int. U. of America (Selby-Battersby & Co.), 125 NLRB 1179 17

Carpenters, etc., Pa. v. United Contr. Ass'n of Ohio Inc., 484 F. 2d 119 (6 Cir. 1973) ..... 27

Colson and Stevens Const. Co., 137 NLRB 1650 (1962) ..... 19

Columbia River Package Ass'n Inc. v. Hinton, 315 U. S. 143 (1942) ..... 20, 21

Connell Const. Co. Inc. v. Plumbers & Steamfitters Local U. No. 100, 483 F. 2d 1154 (5 Cir. 1973) ..... 4, 6, 8, 9

Construction, Production and Maintenance Laborers U. Local 1383 v. N.L.R.B., 323 F. 2d 422 (9th Cir. 1963) ..... 22

Dolly Madison Industries, Inc., 182 NLRB 1037 (1970) ..... 10, 11

Essex County and Vicinity District Council of Carpenters, etc. v. NLRB, 332 F. 2d 636 (3rd Cir. 1964) ..... 19

Hagler Construction Co., N.L.R.B. Case No. 10-CC-447 ..... 6

Howard U. Freeman, Inc., 16-CC-472 ..... 6

Int. Ass'n. etc. v. United Contractors, etc., 483 F. 2d 384 (3rd Cir. 1973) ..... 27

International L. & W. Union v. Juneau Spruce Corp., 342 U. S. 237 (1952) ..... 27

Local 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U. S. 676 (1965) ..... 9, 15

Local 1976, etc. v. National Labor Rel. Board, 357 U. S. 93 (1958) ..... 16



PAGE

National Labor Rel. Bd. v. International Rice Milling Co., 341 U. S. 665 (1951) ..... 23

National Woodwork Mfrs. Ass'n v. NLRB, 386 U. S. 612 (1967) reh. den. 387 U. S. 926 (1967) ..... 19, 20, 23, 24

N.L.R.B. v. Denver Building and Construction Trades Council, 341 U. S. 675 (1951) ..... 14, 18

N.L.R.B. v. General Electric Company, 418 F. 2d 736 (2 Cir. 1969) cert. den. 397 U. S. 965 (1970) reh. den. 397 U. S. 1059 (1970) ..... 12

Northeastern Indiana Bldg. & Const. Tr. C. (Centlivre Village Apartments), 148 NLRB 854 (1964) ..... 19

Northern Pacific R. Co. v. United States, 356 U. S. 1 (1958) ..... 14

Ponsford Bros., N.L.R.B. Case No. 28-CC-417 ..... 6

Schwegmann Bros. v. Calvert Distillers Corporation, 341 U. S. 384 (1950) ..... 14

Standard Oil v. F.T.C., 340 U. S. 231 (1951) ..... 14

Texas Industries Inc., et al., 112 NLRB 923 enf. 234 F. 2d 296 (5th Cir. 1956) ..... 16

United Mine Workers v. Pennington, 381 U. S. 657 (1965) ..... 9-11, 20

**Statutes Cited**

National Labor Relations Act:

Sec. 7 ..... 5, 8, 21, 22

Sec. 8(b)(4)(A) ..... 16

Sec. 8(b)(4)(B) ..... 15

Sec. 8(b)(7) ..... 23

PAGE

National Labor Relations Act:

Sec. 8(c) ..... 15

Sec. 8(e) ..... 5, 16-19, 22-24, 28

Sec. 8(f) ..... 21-24

Sec. 10(j) ..... 26

Sec. 10(l) ..... 26

Sherman Act ..... 7

61 Stat. 136 ..... 5

73 Stat. 519 ..... 5

29 U.S.C.:

Sec. 151 ..... 5

Sec. 157 ..... 5, 8, 21

Sec. 158(b)(4)(B) ..... 15

Sec. 158(e) ..... 5, 15

Sec. 160(j) ..... 26

Sec. 160(l) ..... 26

Sec. 185 ..... 26

Sec. 187 ..... 26

Sec. 301 ..... 26

Sec. 303 ..... 26

**Rule Cited**

Rule 42(2) ..... 2



PAGE

**Other Authorities Cited**

86th Congress, 1960:

H. R. 9070 ..... 24

H. R. 9373 ..... 24

H. R. 9089 ..... 24

S. 2643 ..... 24

89th Congress, 1965:

H. R. 10027 ..... 24

90th and 91st Congress, 1967, 1969:

H. R. 100 ..... 24

92nd Congress:

H. R. 7438 ..... 24

93rd Congress, 1973:

H. R. 4726 ..... 24

II Legislative History of the Labor Management Reporting & Disclosure Act of 1959:

1433 ..... 17

1715 ..... 18

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## Introduction

This brief on behalf of Associated General Contractors of America, Associated General Contractors of Texas and the National Association of Home Builders, as *amici*

*curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, Connell Construction Co., Inc.

## Interest of *Amici*

In the United States general construction costs, including maintenance and repair, total approximately $160,000,000,000.00 yearly. This amount represents approximately ⅛ of the nation's annual gross nations product. The general construction industry as a whole accounts, either directly or indirectly, for the livelihood of one out of every seven employees.

The Associated General Contractors of America (AGC herein) represents approximately 9,500 union and non-union general contractors. In addition, the AGC has some 75,000 union and non-union associate members who are non-general contractors in the mechanical, electrical and other specialized fields. The AGC has chapters in each of the fifty states. AGC members perform about 75% of the general construction contracts in the United States.

The Building Chapters of the Associated General Contractors of Texas are affiliated with the national AGC and the outcome of this litigation will have far-reaching impact on the way they are able to do business in the future.

The National Association of Home Builders is a national trade association of over 51,000 members affiliated with 481 local and state associations in each of the fifty states, Puerto Rico and the Virgin Islands. Its membership annually performs the largest share of new residential construction throughout the United States.



## Summary of Reasons for Granting the Writ

The Circuit Court below erroneously concluded that a conspiracy did not exist and refused to consider the labor law question involved, the resolution of which would have aided it in its determination of whether or not the union had a legitimate union interest under antitrust law. Thus, it left unanswered the question of whether unlawful secondary boycott activity under labor law may simultaneously be considered lawful activity in furtherance of a legitimate union interest under antitrust law. In declining to consider the labor law issue involved, the Court abdicated its jurisdiction and clear responsibility thereby giving its imprimatur to conduct that violates not only secondary boycott proscriptions of the National Labor Relations Act, but also undermines extremely important basic rights guaranteed to employees, employers and the public alike under our federal labor policy.

The factual setting here involved presents an issue of critical importance to the construction industry, and concerns the use of economic coercion in obtaining "hot cargo" provisions. This is the first opportunity that this Court has had to review such issue since the 1959 amendments to the Act. The decision below departs from the teachings of this Court in many respects under antitrust and labor law precedents of long standing. Concerning as it does, the largest industry in the nation, such far-reaching issues of enormous impact on our economy urgently require consideration.

## REASONS FOR GRANTING THE WRIT

### I. The Issues and Effects of the Decision of the Court of Appeals.

The issues presented by this case are of enormous importance to the many thousands of employers and millions of employees engaged in the construction industry, to builders, owners and the public.

The Court of Appeals recognized the broad national significance of the issues presented by this case. Thus, the Court said, "It becomes readily apparent that while this case is framed in the terms of anti-trust, its origins and implications are most intimately connected with and extremely important to the delicate balance of labor-management power in the construction industry and national labor policy pertaining thereto." *Connell Const. Co. Inc.* v. *Plumbers & Steamfitters Local U. No. 100,* 483 F. 2d 1154, 1157 (5 Cir. 1973).

The final decision herein will determine:

(1) Whether a union may through economic coercion compel neutral employers in the construction industry with whom it neither has nor desires a collective bargaining relationship to agree to boycott and refrain from contracting with any employer-subcontractor with whom the union does not have a collective bargaining contract.

(2) Whether such a broad and unlimited employer boycott may be imposed by a union in the absence of any basis for a bargaining relationship.

(3) Whether owners, contractors, suppliers, manufacturers and other employers who perform some degree of construction work on and off site may continue to contract to do business with each other on a competitive basis.



(4) Whether the economic coercion exerted by a union to obtain an agreement of the kind in issue herein, and the agreement itself, is lawful under the construction industry proviso to Section 8(e) of the National Labor Relations Act (herein NLRA).[1] If not lawful under the proviso to Section 8(e), can it be a legitimate union interest under the anti-trust laws?

(5) Whether vast new exceptions have been carved out of our federal anti-trust laws.

(6) Whether state anti-trust laws are pre-empted by federal labor laws.

(7) Whether federal courts have jurisdiction to render decisions in anti-trust cases where such decisions require the interpretation or application of federal labor statutes, or whether the doctrine of primary jurisdiction requires such questions to be decided initially by the National Labor Relations Board.

(8) Whether the millions of employees who derive their livelihood from construction work have the same basic freedoms and rights under the NLRA[2] as other employees generally, or whether Congress through enactment of the construction industry proviso to Section 8(e)[3] effectively stripped from them protections guaranteed to other employees.

The majority of the Court of Appeals has found, in effect, that unions may picket neutral contractors to com-

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[1] 61 Stat. 136; 73 Stat. 519, 29 USC 151 *et seq.*

[2] Section 7, 29 USC 157.

[3] 29 U.S.C. 158(e).

pel them to agree not to contract with other employers who do not have a collective bargaining agreement with the union. The majority opinion concluded that the Respondent Union was pursuing a legitimate union interest because the agreement in issue touched on matters of concern to the working man. Their concept of a "legitimate union interest" which they state may be broader than conduct protected by the NLRA, does not consider whether the conduct is specifically prohibited by the NLRA and thus, quite illegitimate under labor law. Moreover, the majority evades this issue by its misplaced reliance on the doctrine of primary jurisdiction of the National Labor Relations Board (N.L.R.B., Board herein) in such matters.

In this regard the majority opinion specifically stated it felt quite strongly that the Board should consider the matter at the earliest available opportunity. The majority, having knowledge that the Board's General Counsel had refused in the past to issue a complaint in this type of case, also admonished that a continued refusal to decide the difficult issues involved could amount to an administrative abuse of discretion.[4] Those words, however, have fallen on deaf ears, and the Board's General Counsel continues to fail or refuse to issue complaints in cases involving the identical or substantially identical subcontractor agreement which were pending at the time of the decision of the Court of Appeals and are still pending as this petition is filed.[5]

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[4] 483 F. 2d at 1174-1175.

[5] *Ponsford Bros.*, N.L.R.B. Case Nos. 28-CC-417 and 28-CE-12; and *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, 16-CC-472, 16-CC-477. Since then other cases have been filed involving such restrictive agreements, and the NLRB General Counsel has similarly failed to act upon them.



The majority also ruled that Connell could not pursue a remedy under the Texas anti-trust laws because those state laws had been pre-empted by the federal labor laws.

## II. The Anti-Trust Considerations.

This Court in *Allen Bradley Co.* v. *Local 3 IBEW*, 325 U. S. 797 (1945), found that a boycott of electrical products in New York City violated the Sherman Act. Here, the Court is confronted with much more than a product boycott because the agreement *sub judice* includes a product boycott in its all pervasive employer boycott. This is true because of the manner in which construction contracts are let in the construction industry. Historically, labor in the construction industry has not been covered by a separate contract; rather it has been included as a part of the entire contract. The cost of the mechanical contract is generally a very substantial percentage of the total cost of the entire project, and depending upon the type of project, frequently amounts to between 40% and 60% of total construction costs. On larger projects, such as power plants and refineries, the cost of the mechanical equipment, products and supplies covered by the mechanical contract can run into many millions of dollars.

Accordingly, subcontractors, or specialty contractors as they are frequently referred to, sell both product and labor by subcontract to a general contractor who has responsibility for the entire job. Thus, if a given subcontractor employer is excluded because he is not part of the preferred class, both his product (prefabricated or otherwise) as well as his labor is excluded. It locks in the preferred class and locks out everyone else, thereby granting the union building trades and the employers under

contract to them a monopolistic stranglehold on the market.[6] Unless struck down by this Court, the type of employer boycott produced undoubtedly will sweep through the construction industry like wild fire, consuming those employers and their employees who dare resist.

From the standpoint of the employer not in the preferred class, if the union refuses, for any reason, to enter into a collective bargaining agreement with him, he and his employees are foreclosed from the market place. There is no way that an employer or his employees can force a union to sign a collective bargaining agreement. The employer and his employees are at the mercy or whim of the union. The union is in the position of complete dominance and can dictate which employers may enter the market place.

Having this awesome power, the union is likewise in the position of dictating other terms and conditions of how the employer may conduct his business, either within or outside the framework of any collective bargaining agreement. Once the union is elevated to this position of power, even the desires of the employees in the preferred unit can be meaningless and rights under Section 7 of the NLRA completely destroyed.[7] A vote by the

[6] As Judge Clark said in his dissent, "Since no general contractor could withstand the pressure of having his entire work picketed, the meaning to everyone in the plumbing trade is clear—get in Plumbers Local 100 or get out of business." 483 F. 2d at 1176.

[7] 29 USC 157.



employees in such a unit to decertify the union is tantamount to electing unemployment.[8]

The Court of Appeals viewed the facts of this case as not violating the "conspiracy test" enunciated by this Court in such cases as *Allen Bradley, supra,* and *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965) or the "legitimate union interest" test explicated in *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965). In both instances the majority of the Court fails to perceive the massive nature of this employer boycott bottomed on an agreement in restraint of trade.

A conspiracy was shown and does exist. Moreover, the refusal of the Court to decide the labor law issues compounded the problem and stems from its misplaced reliance on the doctrine of primary jurisdiction. It receded from such inquiry despite the fact that it is very critical of the failure of the General Counsel of the Board to issue a complaint in similar cases thereby preventing the Board from coming to grips with the issue.

The factual record clearly establishes that the Union had previously entered into a master agreement with the

[8] As Judge Clark concluded in his dissent:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity." (footnote omitted) 483 F. 2d at 1179

area multi-employer bargaining unit of mechanical and plumbing contractors whereby the Union agreed that it would ". . . not grant or enter into any arrangement or understanding with any other employer which provides for any wages less than stipulated in this Agreement . . ."[9] The record shows that the Union would not permit any employer to sign a contract other than the Master Agreement.[10] That agreement surely does not comport with the standard pronounced in *Pennington, supra,* where this Court said,

> "We think it beyond question that a union may conclude a wage agreement for the multi-employer bargaining unit without violating the anti-trust laws and that it may as a matter of its own policy, and *not by agreement with all or part of the employers of that unit,* seek the same wages from other employers." 381 U.S. at 664 (Emphasis added).

Perforce, if the union goes beyond that limitation and specifically agrees in writing that no other employer will be given better rates, it is a clear anti-trust violation. That is precisely the case here.

By contrast and drawing from the teachings of *Pennington,* the Board considered the legality of such "most favored nations" clauses in *Dolly Madison Industries, Inc.,* 182 NLRB 1037 (1970). In that case the clause provided in essence that should the union at any time enter into an agreement with an employer in the same industry which provided for more favorable terms and conditions, the signatory employer would be privileged to adopt such advantageous terms and conditions as its own. Holding such a provision to be lawful and comparing it to *Pennington* the Board stated,

> ". . . [A]s pointed out by the Supreme Court, the union by reason of the clause there involved abandoned the right to which it and those of its members who were employed by other employers were entitled under the Act to bargain collectively with such other employers concerning substantial terms and conditions of employment—and this to the detriment of itself and other members, thereby frustrating the purposes of the Act." 182 NLRB at 1038.

Yet, the Court's majority decision would sanction conduct which permits the Union to extract an agreement from Connell which would broaden that conspiracy (between the Union and the multi-employer unit of plumbing contractors) by requiring Connell as an unwilling co-conspirator to *impose* the union contract upon its subcontractors or cease doing business with them. Moreover, the Court majority sanctions such conduct by way of economic coercion even though Connell does not have employees who are represented by the Union. In this case, therefore, apart from the illegal nature of the "most favored nations" clause sought, there is absent that critical factor without which such demand is improper, namely, the bargaining relationship.

Consequently, the evil so well enunciated by this Court in *Pennington, supra,* and the Board in *Dolly Madison, supra,* is apparent. Connell has now become an unwilling

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[9] Article XIX, Master Collective Bargaining Agreement (see Petitioner's brief page 9 fn. 6.)

[10] See petitioner's *Statement of the Case* (page 5) in which it refers to testimony by the Union's business agent that the only collective bargaining agreement the union could enter into with plumbing firms was the identical agreement the union had with the multi-employer group of mechanical contractors.

coerced conspirator with the Union and members of the employer group. The conspiracy, therefore, is a very real one which has the effect of preventing employers outside of the preferred class and their employees from doing business with Connell and from determining their own destiny under our federal labor law policy. Manifestly, the agreement would virtually eliminate real competition in the construction industry by removing as a competitive factor, a critical element of a contractor's costs. Indeed, the conspiracy here is more tightly constricted than in normal anti-trust cases. The contract imposed upon Connell would prevent Connell from doing business with an employer *even on the same terms as members of the association, if (a) his employees were either unrepresented or (b) were represented by another union and already covered by a contract.*

Connell must only deal with an employer under contract to the Union and on no more favorable terms. And so the conspiratorial circle is closed, as more and more employers, seeking to do business with Connell, if not members of the association, must execute a contract with the Union whether or not it is in their best interest or that of their employees—and *regardless of its legality.* For example, let us assume Employer A has already entered into a lawful agreement with Union B. How then may it sign a contract with Respondent Local 100 without committing an unfair labor practice? Let us assume further that the employees of Employer A have rejected Respondent Local 100 in a Board conducted election and have voted for no union. How may the employer lawfully recognize Local 100 as its employees' collective bargaining agent and thereby enable himself to do business with Connell? If Local 100, for whatever reason, refuses to permit an employer to sign the multi-employer association agreement, then that employer and his employees are foreclosed from doing business with Connell and all other employers who have similarly signed such restrictive agreement, and quite incongruously, even if an employer and his employees sincerely wanted a relationship by collective bargaining agreement with Local 100, Local 100 cannot engage in good faith collective bargaining because it is bound to offer said employer and his employees no better contract than that negotiated with the multi-employer group.



Clearly, this is an unfair labor practice and a refusal to bargain in good faith. Indeed, it makes the "take it or leave it" Bulwarism[11] approach to bargaining innocuous by comparison. At least Bulwarism was predicated upon a collective bargaining relationship in which the parties had previously negotiated *their own agreement* and the only issue was the bargaining stance of one of the parties.

What is the result if rival unions, possibly emerging unions dedicated to the representation of minorities and females, likewise exerted economic coercion to compel execution of similarly restrictive agreements? If a basis for collective bargaining is not needed, what is to prevent an employer from being successively picketed by rival unions for such agreements? Does the employer capitulate to the demands of each? What does an employer do in the case of a small job where no union subcontractor submits a bid? If the employer is forced to sign more than one such agreement, what are his legal defenses, if any, when sued for specific performance or damages? Where, in such event would employers like Connell and those with whom it would do business turn, if such conduct did not violate

[11] *N.L.R.B.* v. *General Electric Company*, 418 F. 2d 736 (2 Cir. 1969) cert. den. 397 US 965 (1970) reh. den. 397 US 1059 (1970).

the federal anti-trust laws, the state anti-trust laws and the Board could not, as here, consider the matter because its General Counsel refuses to issue complaints?

In a factual setting like *Denver Building Trades* the electrical union there need only change its picket sign to indicate that it is seeking the execution of a subcontractor agreement from the general contractor and that conduct would be lawful. Thus, the teachings of this Court in *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) and the long line of cases adhering thereto would become meaningless.

These examples point out the complete incompatibility of the majority's decision with the basic purposes of the National Labor Relations Act. While the construction industry enjoys a certain "favored" status under the Act, we emphasize again that the vital element absent here is that the agreement does not address itself to the labor relations of the "employer *vis-a-vis* his own employees". *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 US 612 (1967) reh. den. 387 US 926 (1967). Failing this, it is clear secondary boycott activity. Thus, the union's interest is *not legitimate* and cannot avoid anti-trust strictures prohibiting such a massive restraint of trade.

The Sherman Act is "a comprehensive charter of economic liberty", *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 4 (1958); "The heart of our national economic policy long has been faith in the value of competition", *Standard Oil* v. *F.T.C.*, 340 U.S. 231, at 248 (1951); and Courts should not impute to Congress an intent to carve out "vast exceptions" to the Sherman Act unless the Congressional purpose is plain, *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U.S. 384, at 395 (1950).



## III. The Labor Law Aspects.

Having failed to find a conspiracy, the Court majority turned its attention to whether the Union had a legitimate interest in bringing pressure upon Connell to enter into the agreement in issue. However, to fully resolve that question, as the Court found, it is necessary to inquire into the meaning of Sections 8(b)(4)(B) and 8(e)[12] of the NLRA as amended. Regrettably, concluding that the initial decisions in such matters are within the exclusive domain of the Board, the Court discussed but failed to pass upon those questions. Having done so, it abandoned that which *was* its legitimate concern, namely to apply the *Jewel Tea* test to the union's conduct. Only through such an inquiry and determination can light be shed upon whether the union is pursuing a legitimate interest. Such an issue cannot be ignored. Indeed, there can be no finding that the restrictive agreement does not violate the federal anti-trust laws without first finding that the forcing of such employer boycotts is a legitimate union objective, that is, conduct protected by the National Labor Relations Act, or *at least* not unlawful under its provisions.[13]

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[12] 29 U.S.C. 158(b)(4)(B); 29 U.S.C. 158(e).

[13] As Judge Clark commented in his dissent:

> "Not all union misconduct constituting an unfair labor practice should entail a loss of union antitrust exemption; only the conduct which violates the congressionally-protected commercial rights of neutral parties would normally fall without the exemption. It is neither necessary nor appropriate for this dissent to attempt a complete catalogue of that labor law illegal conduct which falls without the exemption. Suffice it to say that since Section 8(e) is designed and intended to protect neutral parties from concerted boycotts required by union activity, a violation of that provision under circumstances similar to those here will place a union beyond the scope of the exemption."

A full understanding of Section 8(e) requires reconsideration of the principles explicated by Justice Frankfurter in this Court's so-called *Sand Door* decision. *Local 1976, etc.* v. *National Labor Rel. Board,* 357 U.S. 93 (1958). In that case, Justice Frankfurter speaking for the Court held that a union is free to approach an employer to persuade him *voluntarily* to sign a "hot cargo" clause, and thus to engage in a boycott so long as the union refrains from coercion. Thus, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited in Section 8(b)(4)(B) (formerly A) of the NLRA.[14]

It was also clear and undisputed law prior to the 1959 amendment adding Section 8(e) that a union *could not strike to obtain such a clause* without violating the secondary boycott provisions of the Act. *Texas Industries Inc., et al.,* 112 NLRB 923 enf. 234 F.2d 296 (5th Cir. 1956); *Bangor Bldg. Trades Council,* 123 NLRB 484, enf.

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[14] Interestingly, the dissent of Justice Douglas in *Sand Door,* which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that as the clause would be the product of *collective bargaining,* it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion.*" (357 U.S. at 112). (Emphasis added)



278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons and Plasterers, Int. U. of America* (*Selby-Battersby & Co.*), 125 NLRB 1179.

Initially, the congressional purpose of the 1959 amendments was to outlaw all "hot cargo" agreements even if voluntary in nature in all industries. Thus, the legislative history demonstrates the effort to make even such voluntary agreements as were considered legal under *Sand Door,* illegal. As debate continued, however, the construction industry proviso was added at the urging of the building trades unions, but as agreed upon, was merely intended to preserve to labor organizations in the construction field the rights which they possessed under *Sand Door* and before enactment of Section 8(e), namely, the right to secure such clauses *voluntarily.*

Then Senator Kennedy said,

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case [35 LC P71, 599] (357 U.S. 93) is applicable. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the *legality of a strike to obtain such a contract.*" II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added)

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a con-

struction site. II Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 1715.

Also, specifically preserved were the principles enunciated by this Court in *National Labor Rel. Bd.* v. *Denver Building and Construction Tr. C., supra,* condemning secondary boycotts intended to enmesh neutral contractors in disputes not their own.

Since Congress only intended to preserve the *status quo,* construction unions, therefore, came away with no greater rights than they enjoyed prior to the enactment of the proviso to Section 8(e). Yet, the decision below would permit a coercive boycott of secondary employers of unlimited reach, and at the same time thereby sanction a jurisdictional dispute of grand design. It confers an extraordinary, exclusive and preferred status upon construction unions without legal justification by valid precedent or legislative intendment.

*Amici* know of no cases where any court or Board decision has held that an employer can be forced by a picketing unit or union organization to enter into a "hot cargo" clause in the total absence of a collective bargaining relationship. Moreover, there never has been any expression by this Court since *Sand Door* in a construction industry case, approving the use of any form of coercion to obtain a "hot cargo" provision in a collective bargaining agreement. While the issue in *Sand Door* involved a strike to enforce a "hot cargo" provision which was struck down, even the dissent by Justice Douglas observed, that the clause in *Sand Door* ". . . was the product of *bargaining, not of coercion*". 357 US at 112 (See fn. 14 supra) (Emphasis added). Thereafter, the legislative history of the 1959 amendments make it clear beyond doubt that this status of the law was to be retained. And finally, Justice Brennan writing for



the majority in *National Woodwork* buttresses this position by observing that ". . . provisos were added to Section 8(e) to preserve the *status quo* in the construction industry . . .". 386 US at 637. Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court since the 1959 amendments.[15]

Much confusion has developed with regard to this specific issue and it is submitted that the teachings of *Sand Door* and subsequent events, which span sixteen years involving the largest industry in the nation, require examination by this Court. It is also noteworthy that the Court in *National Woodwork* said, "We likewise do not have before us in these cases, and express no view upon,

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[15] This issue of whether or not coercive conduct can be used to obtain a "hot cargo" clause was first considered by the Board after the 1959 amendments in 1962 in *Colson and Stevens Const. Co.,* 137 NLRB 1650 (1962). The case warrants close reading and is extremely significant because of the unanimous expression of the full five-member Board prohibiting any coercion to obtain a "hot cargo" clause in the construction industry. Thereafter, because of disapproval of this view in three circuits, the Board reversed its original well-reasoned and well-founded opinion. Consequently, such holdings stand in conflict with *Sand Door.* However, the specific reach and meaning of the proviso to Section 8(e) has not been addressed by this Court in any context since the 1959 amendments. Moreover, even in cases that followed the reversal of *Colson and Stevens* where economic coercion has been allowed to obtain a "hot cargo" clause, the factual settings involved a collective bargaining vis-a-vis relationship, which fact is significantly absent here. *Northeastern Indiana Bldg. & Const. Tr. C. (Centlivre Village Apartments),* 148 NLRB 854 (1964); (where however the Board specifically noted that it was not passing upon the legality of the clause in question) 148 N.L.R.B. at 856 *fn.* 11; *Essex County and Vicinity District Council of Carpenters, etc.* v. *NLRB,* 332 F. 2d 636 (3rd Cir. 1964).

the antitrust limitations, if any, upon union-employer work preservation or work extension agreements. See *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 662-665". 386 U.S. at 632 fn 19. Thus, the issues mentioned in that footnote in addition to those here advanced have not been considered in the context of an antitrust case.

In *National Woodwork, supra,* this Court in considering whether so-called work preservation clauses violated the secondary boycott provisions of the Act, said:

> ". . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 645.

If a vis-a-vis relationship is necessary to shield economic coercion for work preservation purposes, surely the absence of such relationship is fatal to "hot cargo" pressures. Connell has no employees represented by this labor organization and the union specifically disavows recognition. The union's objectives must, therefore, be tactically directed elsewhere. In fact, the Court below found that

> ". . . The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors." 483 F.2d at 1167.

Thus, the *"vis-a-vis"* relationship is totally absent and the primary purposes of the Act, namely, to promote free collective bargaining are defeated.

Finally, in *Columbia River Package Ass'n Inc.* v. *Hinton*, 315 U.S. 143 (1942) an anti-trust case having labor law overtones, this Court said:



> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the approximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." 315 U.S. at 146-147.

## iV. The Circuit Court's Holding Runs Contrary to the Fabric of the National Labor Relations Act.

The conduct here involved, is at complete variance with the basic purpose of the National Labor Relations Act. One has only to look at the broad Congressional intent expressed in Section 7 and throughout the act.[16] Section 7 preserves to employees the right to self-organization, to form, join, or assist a labor organization, and to bargain collectively through a representative of their own choosing. The right to refrain from such activities is also protected. The broad underlying purposes of Section 7 and the representative procedures of the Board have been relaxed in only one specific instance, the enactment of Section 8(f) in 1959.[17] Under this provision an employer primarily engaged in the construction industry is permitted to enter into a so-called "pre-hire" agreement recognizing a union (by a full collective bargaining agreement complete with all the terms and conditions of employment) even though it has *no employees* or *few em-*

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[16] 29 U.S.C. 157.

[17] See Appendix hereto.

*ployees* and the majority status of the union has not been established. However, as we shall see, it was not the Congressional purpose of Section 8(f) to permit the imposition of a collective bargaining relationship by coercion or in the absence of an existing or potential *vis-a-vis* relationship.

Section 8(f), by its terms *requires* that the employees who are to be covered by any such pre-hire agreement *must be members of the particular union negotiating the agreement*. Thus, Section 8(f) requires that which is clearly missing here, a valid basis for a bargaining relationship between the employer and the union. Herein lies the fatal defect in the scheme here presented—no *vis-a-vis* relationship and no possibility of such relationship.

Moreover, by providing that a pre-hire agreement shall not constitute a bar to an election under the Act by which dissatisfied employees may exercise their Section 7 rights, even in these exceptional circumstances, Congress has preserved to union members the right to determine their own destiny.

Finally, it is clear that a pre-hire agreement must be a voluntary arrangement. As the Ninth Circuit said in *Construction, Production and Maintenance Laborers U. Local 1383* v. *N.L.R.B.*, 323 F.2d 422 (9th Cir. 1963):

> "Section 8(f) makes certain prehire collective bargaining agreements, otherwise unlawful under the Act permissible in the construction industry; but the legislative history contains statements specifically disclaiming an intention thereby to authorize strikes or picketing to coerce such prehire agreements." 323 F. 2d at 425.



Thus, on what possible basis can the picketing in this case lawfully bring about such a contract with Connell? Is it at all logical to assume that Congress in 1959 would have so carefully drafted Section 8(f), creating unusual new rights but protecting against abuse of these rights by prohibiting coercion to utilize them only to have those protections wiped away in Section 8(e)? And, without one word of legislative history to support such a contention? Obviously not!

Clearly, rights granted in Section 8(f) are extraordinary and unusual, but they must be based upon voluntary agreement free from coercion. Similarly, as stated in the legislative history referring to *Sand Door*, and buttressed by the observation of Justice Brennan in *National Woodwork*, the construction industry proviso to Section 8(e) merely preserved pre-1959 *Sand Door* rights permitting a voluntary "hot cargo" clause obtained without coercion. Additionally, a 1959 amendment to the secondary boycott provision closed the loophole created by the *International Rice Milling*[18] decision, eliminating the need for concerted action and prohibiting any such secondary conduct by an individual. Finally, new provisions regulating various types of picketing and representation proceedings were included in Section 8(b)(7). Once again, the emphasis being to eliminate what has been described as blackmail picketing and proscribing picketing in various situations.

In sum, the 1959 amendments establish a clear pattern of requiring voluntariness, particularly in dealing with the construction industry proviso to Section 8(e) and

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[18] *National Labor Rel. Bd.* v. *International Rice Milling Co.*, 341 US 665 (1951).

Section 8(f), and further proscribed picketing and the use of coercion. The instant case stands in clear contravention of that pattern and the teachings of this Court.

If the decision below is permitted to stand, the obvious effect will be to impose a collective bargaining agreement upon neutral employers and their employees without further recourse, if they want to do business with Connell or vice versa.

Finally, we call the Court's attention to the fact that permitting coercion to be brought upon a general contractor to secure such a clause would allow the union to obtain indirectly that which it has been unable to obtain through enactment of the so-called common situs legislation it has perennially proposed, i.e., the ability to strike or picket any contractor at the site because of a dispute with any other contractor.[19] Congress has consistently denied this legislation, since 1960, but if the decision below were permitted to stand, it would not be needed.

Therefore, this case does not comport with either *Sand Door* or *National Woodwork*. It is not consistent with the purposes of the proviso to Section 8(e) or Section 8(f). In short, it is a completely novel approach to collective bargaining. The preamble of the Taft-Hartley Act states that its purpose is to prevent industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce and to promote free collective bargaining. The Act governs how this is to be brought about, regulated

[19] See for example H. R. 9070, H. R. 9089, H. R. 9373, and S. 2643 (86th Congress, 1960); H. R. 10027 (89th Congress 1965); H. R. 100 (90th and 91st Congress, 1967, 1969); H. R. 7438 (92nd Congress); and H. R. 4726 (93rd Congress, 1973).



and controlled. Astonishingly, this approach to a collective bargaining relationship does not promote, but rather seeks to prohibit free collective bargaining. It seeks to escape all the procedures and all the strictures of the Act by the unfettered use of coercion. Blackmail picketing does not foster free collective bargaining; it is a means whereby it is destroyed. Patently, as *amici* have urged above, the Union's scheme and restrictive agreement clearly runs counter to the entire fabric of the Act. It promotes, rather than eliminates, industrial strife.

## V. The Court of Appeals has Jurisdiction to Decide Whether the Union's Conduct is Lawful Under Section 8(e) as a Vital Factor in its Determination Whether the Clause Represents "a Legitimate Union Interest" Under the Anti-Trust Laws as Construed by This Court.

The Court majority specifically notes that the Board's General Counsel has refused to act upon charges which would bring this question before that administrative body. Still, despite the recognized inaction of the General Counsel, the Court majority would leave the labor questions which are inextricably intertwined with the anti-trust question unresolved because it does not ". . . have original jurisdiction to determine *unfair labor practices.*" 483 F. 2d at 1174 (Emphasis added)

We agree that the Court does not have authority to make unfair labor practice findings as such. However, the determination as to whether the restrictive agreement in question violates Section 8(e) does not require a finding that it is an unfair labor practice, but merely a finding that if Congress did not intend by that section

to make such agreements legitimate, the Union's interest is not legitimate under the anti-trust laws. Surely, an employer should not be required to abandon his anti-trust remedy merely because another remedy before the Board though not forthcoming, is possible.

In his dissenting opinion, Judge Clark stated:

> ". . . In light of the General Counsel's established reluctance to submit the issue in this case to the Labor Board for resolution, and in view of the serious antitrust questions involved which are surely not within the scope of the Board's expertise, I would hold that this court and the district court below are not preempted from resolving the labor law problems in this anti-trust action." 483 F. 2d at 1180.

*Amici* submit that Judge Clark's view is proper and totally harmonious with the purposes of the National Labor Relations Act and the antitrust laws.

The courts are frequently called upon to adjudicate labor disputes. In fulfilling their role pursuant to Section 10(j) and 10(l)[20] they must determine whether there is reasonable cause to believe that a violation of the Act has been committed. In suits under Sections 301 and 303[21] their role clearly goes further to a determination under which the employer may recover damages.

In a Section 303 damage action the district court must determine whether the union's action constitutes an unlawful secondary boycott—a prime issue in this case.

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[20] 29 U.S.C. 160(j), (l)

[21] 29 U.S.C. 185; 29 U.S.C. 187.



No prior decision by the Board must precede a determination by the district court. *International L. & W Union* v. *Juneau Spruce Corp.*, 342 U. S. 237 (1952). Why, then, must a different standard be applied by a court called upon to make an anti-trust ruling involving the same labor law issue? Moreover, this problem was resolved by *Jewel Tea* where, concluding that the anti-trust issues in that case did not call for application of the doctrine of primary jurisdiction, this Court stated:

> ". . . [T]he doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 521 (Frankfurter, J., dissenting)." 381 U. S. at 686.

The seriousness of the continuing problem to courts and litigants is highlighted by the inability of the Third and Sixth Circuits to obtain from the Board answers to labor law questions intertwined with anti-trust questions. *Int. Ass'n. etc.* v. *United Contractors, etc.*, 483 F. 2d 384 (3rd Cir. 1973); *Carpenters, etc., Pa.* v. *United Contr. Ass'n of Ohio Inc.*, 484 F. 2d 119 (6 Cir. 1973). In these cases, the courts directed that questions be certified to the Board, and the Board has thus far declined to answer the questions as directed. The Board's General Counsel has filed briefs in both cases, taking the position that there is no Board procedure available for the answering of such certified questions, and advising, in effect, that the Board can only answer questions in cases that have been processed through its administrative procedures. Yet, in cases

involving the kind of restrictive agreements involved herein, the General Counsel continues to refuse to issue complaints, notwithstanding the admonishment of the Fifth Circuit that such refusal may constitute an abuse of discretion. The question then is just how does petitioner obtain an answer from the Board or the courts where such answer is critical to the antitrust determination?

We submit, therefore, that the antitrust remedy which Connell seeks should not be deferred or forever denied because of its inability to obtain a definitive ruling on the labor law questions involved. The Court of Appeals should have considered the validity of the restrictive agreement under the proviso to Section 8(e), not in the context of an unfair labor practice case, but rather as a necessary element of *this* antitrust case, and as an issue within its province in any event. Only through the granting of this petition may such questions be answered.

## CONCLUSION

Vital questions concerning the proper interpretation of the anti-trust laws and the National Labor Relations Act are presented by this case which are of critical significance to the construction industry, our economy and national labor policy. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

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## APPENDIX

Section 8(f) (29 USC 158(f)) provides:

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Pro-

vided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title."